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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellee.

On Appeal from the District Court of the United States for the District of New Jersey

MEMORANDUM IN OPPOSITION TO MOTION IN THE ALTERNATIVE BY APPELLANT TO CORRECT DIMINUTION OF RECORD

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.
City Hall,
Jersey City, N. J.

CHARLES HERSHENSTEIN,
Of Counsel.

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Appellee, City of Jersey City, respectfully maintains that the motion of the appellant should not be granted for the reasons that:

1. The subject matter of the transcript in question is in no sense a part of the record or proceedings below, properly subject to inclusion in the record of appeal.

2. The transcript comprises the argument before the district court on the application for an interlocutory injunction, which application and the resulting interlocutory injunction have become moot by virtue of the issuance of a final injunction and the filing of the present appeal therefrom by appellant.

3. The several alleged grounds of necessity for reference to the transcript in the argument of appellant's appeal are frivolous and insufficient to warrant inclusion of the transcript in the present record.

POINT I.

The proceedings of November 24th, 1943 and November 26th, 1943, do not form a part of the record or proceedings below properly includable in the record of appeal.

Inspection of the transcript, which has been annexed to appellant's motion papers as "Exhibit A," will demonstrate that it consists entirely of legal argument by counsel, colloquy between court and counsel, between members of the court, and among counsel. Not a single witness was sworn and all of the evidence adduced in the proceedings is contained in the record of appeal and is fully intelligible without reference to the transcript here in question.

Rule 10, paragraph 2, of the Rules of the Supreme Court provides that:

> ". . . Sections (c), (e) and (h) of Rule 75 and Rule 76 of the Rules of Civil Procedure are incorporated herein by reference and are made applicable to an appeal to this court from a Federal District Court".

Rule 75(e) provides as follows:

> "(e) *Record To Be Abbreviated.* All matter not essential to the decision of the questions presented by the appeal shall be omitted . . .".

It is fundamental that colloquies between a trial judge and counsel, or between counsel, are no proper part of the

record on appeal. 4 C. J. S. 1207. Addresses or arguments of counsel are not a proper constituent of the record. *Id.*

Several decisions of the Circuit Courts of Appeal, construing Rule 75, confirm the impropriety of the inclusion in an appeal record of arguments of counsel or colloquies.

In *Middleton* v. *Hartford Accident & Indemnity Company,* 119 F. 2d 721 (C. C. A. 5th 1941), the court, referring to the proper contents of the "record and proceedings" on appeal, under Rule 75 of the Federal Rules of Civil Procedure, said, at page 724:

> "If there is a reporter's transcript, it may be required to be used by either party, in whole or in part, subject to correction by the judge. But this does not mean that always the entire transcript is or can be required to be used. Much of it often consists of preliminary statements, arguments of counsel, repetitions, irrelevancies, which counsel and the trial judge know are immaterial and could easily strike out; but the materiality of them can be discovered in the appellate court only by reading and considering it all after the expense of transcribing and printing has been incurred. That only the parts of the transcript essential to the questions to be decided are to be used is apparent from Rule 75(b) and (e)."

The arguments of counsel, constituting a major portion of the transcript sought to be included in the record by the present motion, are of no different nature than a filed brief. Briefs are certainly no part of the record. *Black & Yates, Inc.* v. *Mahogany Association,* 129 F. 2d 227, 237 (C. C. A. 3rd 1941).

In *Royal Petroleum Corporation* v. *Smith,* 127 F 2d 841 (C. C. A. 2d 1942), the court said, at page 843:

> "We wish further to call attention to the inclusion in the present record of the colloquy of court and coun-

sel. Rule 75(e), explicitly forbids 'all matter not essential to the decision'; and indeed before the Rules went into effect we had repeatedly declared against the practice (citing cases). None of the colloquy which was printed can be thought to have been in the remotest way 'essential to the decision'. If in the rambling discussions anything 'essential' had appeared, it should have been selected and put in such form as to be comprehensible. We cannot undertake to grope our way through a heap of rubbish on the odd chance of picking up a bit of sound metal here and there."

It is thus perfectly plain that since the transcript here in question contains no evidence whatsoever, but merely argument of counsel and colloquy, it has no proper place in the record and the pending motion should therefore be denied on that ground alone, if for none of the others hereinafter set forth.

POINT II.

The proceedings included within the transcript in question were all preliminary to the granting of an interlocutory injunction, the issuance of which has become moot because of the later granting of a final injunction.

The proceedings of November 24th, 1943 and November 26th, 1943, the subject matter of the transcript in question, constituted solely the argument and colloquy on the application for interlocutory injunction. Such injunction was granted November 26th, 1943. Final hearing was held December 14th, 1943, resulting in the issuance of a final injunction. Although appeal has been taken to this court from the granting of both the interlocutory and final injunctions,

it is plain that because of the appeal from the final injunction, the propriety of the issuance of the interlocutory injunction is moot. *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588. No action which this court may take upon appeal can directly affect the position of the appellant for the period of time which elapsed during the pendency of the interlocutory injunction. This court can be concerned only with the question of the continuance in effect or the abrogation of the existing final injunction, which has naturally superseded the operative effect of the interlocutory injunction.

Appellant indicates one of its real motives for the present motion in its showing, in the present motion papers, of the belief which it entertains that it will be able, some time in the future, to maintain an action for damages against the appellee, City of Jersey City, by reason of appellee's "reckless, if not malicious," prosecution of its application for the interlocutory injunction. We submit that this Court will not lend its dignity toward aiding and abetting the prosecution, in some collateral proceeding, of a claim for damages by one of the parties to the instant appeal against another, through the instrumentality of inclusion in this record of subject matter otherwise improper.

POINT III.

The several alleged grounds of necessity for reference to the transcript are frivolous and insufficient.

Appellant contends that the inclusion of the transcript in the record is necessary in order to show that the court below violated Rule 65(c) of the Rules of Civil Procedure, dealing with bonds on granting of preliminary injunction, by not requiring the appellant, City of Jersey City, to furnish a bond. This contention is without substance for the following reasons:

1. The failure to require a bond has become academic and moot since the bond requirement only applies to an application for a preliminary injunction and the preliminary injunction has now been superseded by a final injunction. See Point II, *supra*.

2. In any event, the appellee, the Economic Stabilization Director, also being a party plaintiff and praying for the issuance of the injunction, it made no difference that a co-plaintiff was applying for such relief, Rule 65(c) being specifically inapplicable to "the United States or * * * an officer or agency thereof."

Appellant also contends that the transcript in question should be included in the record for the reason that some of the findings made by the court are stated to be based in part on "pleadings and arguments" herein. Appellant pretends to have the right to demonstrate on this appeal that the "arguments" made before the court below do not substantiate its action or its findings. If the strict record, including the evdence, does not legally justify the action of the court below, appellant will prevail. Appellant does

not carry the affirmative burden of demonstrating that none of the arguments made in support of the action taken by the court below were legally sufficient.

Appellant also relies upon the fact that it can show from remarks made from the bench by members of the court that the court entertained an improper and erroneous conception of its proper scope of action in the matter of an application for a preliminary injunction. Obviously comments made by judges in the course of the hearing are in no sense binding upon the court or indicative of anything save their curbstone impressions. Appellant is not at liberty to impute any theories, views or attitudes to the trial judges other than those for which they make themselves expressly responsible when they issue their opinion, findings of fact and judgment or decree.

Conclusion

It is respectfully submitted that none of the pretended bases for the inclusion of the transcript in question in the record are sound or justifiable.

For any or all of the reasons stated it is respectfully submitted that the motion should be denied.

Respectfully submitted,

CHARLES A. ROONEY,
Attorney for Appellee,
City of Jersey City.

CHARLES HERSHENSTEIN,
Of Counsel.